

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**JAMES B. DALY JBD, LLC,**

**Respondent.**

**Docket No. FMCSA-2008-0077<sup>1</sup>  
(Eastern Service Center)**

**FINAL ORDER**

**1. *Background***

On December 10, 2007, the Pennsylvania Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) against James B. Daly JBD, LLC (Respondent) following a compliance review of Respondent conducted on November 6, 2007.<sup>2</sup> The NOC charged Respondent with: (1) one violation of 49 CFR 382.215, using a driver known to have tested positive for a controlled substance, with a proposed civil penalty of \$2,240; (2) one violation of 49 CFR 382.301(a), using a driver before the motor carrier has received a negative pre-employment controlled substances test result, with a proposed civil penalty of \$1,170; and (3) one violation of 49 CFR 391.45(b)(1)/391.11(a), using a driver not medically examined and certified during the preceding 24 months, with a proposed civil penalty of \$980. The NOC proposed a total civil penalty of \$4,390.

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<sup>1</sup> The prior case number was PA-2008-0028-US0063.

<sup>2</sup> Exhibit A to Motion for Default and Final Agency Order (hereafter Motion for Default).

Respondent replied to the NOC on January 2, 2008.<sup>3</sup> The reply only addressed the alleged § 382.215 violation. Respondent admitted that the driver in question tested positive for a controlled substance on October 14, 2006, but claimed that it used him only after he tested negative for all controlled substances on November 3, 2006. It did not request administrative adjudication.

On March 11, 2008, the Field Administrator for FMCSA's Eastern Service Center (Claimant) moved for entry of an order of default declaring the NOC, including the civil penalty, as the final agency order in the proceeding. Claimant argued that Respondent should be found in default because its reply was so deficient as to constitute a failure to reply. Respondent did not reply to the Motion.

## ***2. Decision***

Section 386.14(b) of the Agency's Rules of Practice requires a respondent, in replying to an NOC, to either pay the full amount of the claim, contest the claim by requesting administrative adjudication or seek binding arbitration regarding the proposed civil penalty. Respondent did not address the §§ 382.301(a) and 391.45(b)(1)/391.11(a) violations. According to § 386.14(d)(1), any allegation in the claim not specifically denied in the reply is deemed admitted. Therefore, by its silence, Respondent admitted these violations.

Although Respondent contested the § 382.215 violation, it admitted knowing that its driver tested positive for a controlled substance in October 2006 and that it used him to drive a commercial motor vehicle (CMV) with knowledge of the positive test results. Respondent's denial of the charge was based on its claim that the driver tested negative in

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<sup>3</sup> Exhibit B to Motion for Default.

November 2006 and, consequently continued use of the driver at that point was not a violation. Respondent's argument, however, is flawed and does not constitute a meritorious defense.

Section 382.215 prohibits a driver from reporting for duty, remaining on duty or performing a safety sensitive function (such as driving a CMV) if the driver tests positive for a controlled substance. It also prohibits employers with actual knowledge that a driver has tested positive for a controlled substance from permitting the driver to perform or continue to perform safety sensitive functions. Respondent was under the mistaken impression that the November 2006 negative drug test eliminated its regulatory responsibilities regarding the continued use of a driver who tests positive for a controlled substance. Section 382.503 prohibits an employer from permitting such a driver from driving a CMV unless the driver and employer comply with the requirements of 49 CFR part 40, subpart O. These requirements include having the driver evaluated by a substance abuse professional (SAP);<sup>4</sup> ensuring that the driver successfully complies with the SAP's recommendations for education and/or treatment;<sup>5</sup> ensuring that the driver takes a return-to-duty test (and tests negative) following successful compliance with the SAP's recommendations;<sup>6</sup> and carrying out the SAP's prescribed follow-up testing requirements.<sup>7</sup> These requirements are designed to prevent precisely what occurred in this case, i.e., a new controlled substances test at the discretion of Respondent with the

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<sup>4</sup> 49 CFR 40.289(b).

<sup>5</sup> *Id.*

<sup>6</sup> 49 CFR 40.305(a).

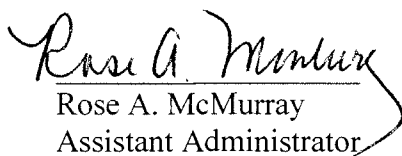
<sup>7</sup> 49 CFR 40.309(a).

strong possibility that the driver knew when he would be retested. Consequently, I conclude that Respondent admitted violating § 382.215.

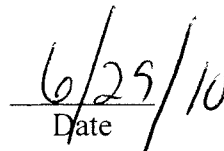
Once a respondent has admitted violations for which it is charged, it should choose to either pay the full amount of the civil penalty or seek binding arbitration on the amount of the civil penalty and/or the length of time in which to pay it.<sup>8</sup> Because Respondent chose neither option, it defaulted with respect to all three violations.

Accordingly, Claimant's Motion for Default will be granted. Respondent's default makes the NOC, including the civil penalty proposed in the NOC, the Final Agency Order in this proceeding.

THEREFORE, *It Is Hereby Ordered That*, Respondent pay to the Field Administrator for the Eastern Service Center, within 30 days of the service date of this Final Order, a total civil penalty of \$4,390 for three violations of the Federal Motor Carrier Safety Regulations. Payment may be made electronically through FMCSA's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order may be remitted to the Claimant at the address shown in the Certificate of Service.<sup>9</sup>

  
Rose A. McMurray  
Assistant Administrator

Federal Motor Carrier Safety Administration

  
Date

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<sup>8</sup> See *In the Matter of Archie Palmer*, Docket No. FMCSA-2007-26787, Final Order, May 11, 2007. Respondent did not challenge the amount of the civil penalty.

<sup>9</sup> Pursuant to 49 CFR 386.64, a petition for reconsideration may be submitted within 20 days of the issuance of this Final Order.

**CERTIFICATE OF SERVICE**

This is to certify that on this 1 day of July, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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